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Supreme Court, U.S.
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No. 95-1016

In The

Supreme Court of the United States

October Term, 1995

KATHLEEN QUICK,

Petitioner,

v.

NATIONAL AUTO CREDIT, INC.
f/k/a AGENCY RENT-A-CAR, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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REPLY BRIEF

Respondent, Agency Rent-A-Car, Inc., now known as National Auto Credit, Inc. has made several misstatements within its brief in opposition.

First, the Eighth Circuit Court of Appeals did not determine that the judgment below included tort damages. In fact, a judgment was rendered for actual damages. The Eighth Circuit logically inferred that the jury also found that a claim for bad faith had been established because it awarded punitive damages, in addition to the actual damages. (See opinion at p. 5 Petitioner's App.)

The measure of the actual damages sustained by Wilhite, claims for which were assigned to Quick, were essentially the same whether they sounded in contract or in tort. Contrary to Respondent's representation, there in fact is no distinction between actual damages attributable to the tort claim and the breach of contract claim.

The general rule for measuring damages for breach of contract is to put the non-breaching party in as good a position as he would have been had the contract been kept or performed. See 11 Samuel Williston, Williston on Contracts, § 1338 (Walter H. E. Jaeger & Ruth Jaeger Fielding, eds., 3d ed. 1968); 5 Arthur Linton Corbin, Corbin on Contracts, § 992 (1964); John Calamari, et al., The Law of Contracts, § 14-4 (3d ed., Horn Book Series 1987). The assigned tort claim of bad faith sought recovery of actual damages which were the same actual damages applicable to the breach of contract claim, and properly measured in the same manner. 4 Restatement (Second), Of Torts § 903 cmt. a (1979).

This Court specifically has held that where the loss is merely pecuniary, the measure of damages for a breach of a duty implied as a matter of law, (i.e., a tort), or for a breach of a contract duty remains essentially the same. In *Carey v. Piphus*, 435 U.S. 247, 55 L.Ed.2d 252, 98 S. Ct. 1042 (1978), the Supreme Court stated: "Our legal system's concept of damages reflects this view of legal rights. 'The cardinal principle of damages in Anglo-American law is that of compensation for the injury caused to plaintiff by defendant's breach of duty.' 2 F. Harper and F. James, Law of Torts, § 25.1, p. 1299 (1956)." The Supreme Court reiterated the general rule applicable to award of damages for breach of a duty implied by tort law in *East River Steam Ship Corporation v. Transamerica Delaval, Inc.*, 476 U.S. 858, 90 L.Ed.2d 865, 106 S. Ct. 2295 (1986), holding that damages for a claim sounding in tort generally should compensate a plaintiff for loss and return the plaintiff to a position he would have occupied before the injury.

There never has been any question or contention that Wilhite's damages were anything other than the judgment of $6.5 million plus interest resulting from the breach of obligations owed to him by Agency. The effort on the part of Agency to distinguish "tort based damages" from contract based damages is an effort to make a distinction without a difference. Pecuniary losses asserted, whether in the prosecution of a tort claim or breach of contract claim, entitle a party to recover its damages in such sum as is necessary to make the non-breaching party whole.

The assertion at page 3 in Respondent's brief in opposition that " . . . Agency moved for judgment as a

matter of law at the close of the Petitioner's evidence, and at the close of all evidence, on the same grounds on which the Eighth Circuit reversed (except assignability)" is absolutely incorrect. The Eighth Circuit, in reversing judgment of the trial court, factually determined Agency had no control over the settlement process and therefore owed no fiduciary duty. The motions referenced by Agency in its brief in opposition never disclaimed that it had the right and obligation to control defense, control settlement, or that a fiduciary duty was owed to Wilhite. The appendix to Agency's brief in opposition, at p. 21a (Excerpts of Brief of Appellant National Auto Credit, Inc. – submitted to the Eighth Circuit) reflect, in part, Agency's admission of these facts. The testimonial admissions at trial of Agency's vice president and head of its claims department, its claims adjuster assigned to the case, and its own in-house counsel that Agency controlled defense of Wilhite, controlled settlement of the claims against Wilhite and in fact owed Wilhite a fiduciary duty are set forth verbatim within the petition and suggestion for rehearing filed with the Eighth Circuit Court of Appeals after issuance of its opinion (see Appendix to Petition for Writ of Certiorari at pp. 61-77).

Agency asserts that the Eighth Circuit made legal determinations, not fact determinations contrary to those of the jury. (Brief in Opposition, p. 4) In fact, the judgment of the Eighth Circuit determining that the District Court should have granted Agency's motion or motions for judgment as a matter of law was premised upon the Eighth Circuit's oversight or refusal to accept the facts placed into evidence before the jury and which the jury implicitly determined in Quick's favor by its verdict.

Reaching a legal conclusion after refusing to consider and accept the facts and testimonial admissions which the jury heard at trial, or ignoring those facts, is an invasion of the province of the jury in violation of the seventh amendment.

The Court may dispense with the assertions that Quick may have belatedly raised a constitutional issue by noting that there was no constitutional issue in the case until the opinion was handed down by the Eighth Circuit. Subsequent to the opinion, the constitutional issues were raised as indicated within the petition for rehearing (Petitioner's Appendix to Petition for Writ of Certiorari at pp. 61-77).

Agency has suggested to this Court that Quick failed to raise the fourteenth amendment due process issue in the Eighth Circuit and should be precluded from doing so now. Neither at trial nor during appeal was there any indication that Kathleen Quick would suffer a constitutional deprivation.

The Eighth Circuit has created the fourteenth amendment violation by determining that under Missouri's automobile insurance and self-insurance laws, those who obtain automobile liability protection from a self-insured automobile rental company are denied the same damages available to those who obtain automobile insurance from a company that is primarily engaged in the business of automobile insurance. To the extent that the Eighth Circuit may be deemed correct in its determination of Missouri law that breach of a car rental contract where a fiduciary duty was owed allows for a different measure

of damages than breach of any other type of insurance related contract where a fiduciary duty is owed, then Wilhite did suffer disparate treatment in the application of state law. Allowing for such disparate treatment is a violation of his fourteenth amendment rights.

Agency rightfully has suggested that the fifth amendment is appropriate in this case; however, for the wrong reason. Agency admitted during trial that it owed a fiduciary duty and a duty of trust, just like an insurance company; a duty to settle claims within limits; and a duty to defend. These facts were not disputed at the trial level nor raised as an issue on appeal. The Eighth Circuit's determination that Agency did not owe a fiduciary duty when this fact was admitted by Agency violates Quick's fifth amendment right of due process and this Court's long standing rule against deciding issues not raised at the lower court or on appeal.

In the case of *Singleton v. Wulff*, 428 U.S. 150, 49 L.Ed.2d 826, 96 S. Ct. 2868 (1976), this Court instructed the Eighth Circuit that:

> It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, the Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence," at 2877.

Petitioner Quick could no more anticipate that the Eighth Circuit would violate the Seventh Amendment to the United States Constitution than it could reasonably anticipate that the Eighth Circuit would refuse to follow the well-documented standard of review in addressing a motion for judgment as a matter of law. *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796 (8th Cir. 1994). The only way that Quick could have brought the constitutional questions before the Eighth Circuit any earlier would have required an assumption that the Eighth Circuit would completely refuse to recognize and follow any fundamental legal principles.

Contrary to the contention of Agency, the amount of damages awarded on the breach of contract claim was not limited under Missouri law to the contractual limit of liability protection which Agency had promised to provide for Wilhite's benefit. Wilhite never asserted a claim to recover the benefit of his contract with Agency after the default judgment was obtained against him. He lost that promised benefit when Agency refused to defend him in the wrongful death suit instituted against him by Quick, refused to settle the wrongful death suit, and allowed a judgment to be obtained against him for $6.5 million. The uncontroverted evidence presented at trial established that the wrongful death suit against Wilhite could have been settled by payment of the $25,000.00 liability protection limit which Agency promised. The uncontroverted evidence at trial established that Agency was forewarned that the wrongful death suit against Wilhite might have a value equal to or exceeding $6.5 million. The uncontroverted evidence at trial established that a $6.5 million judgment rendered against Wilhite

would not have occurred had Agency provided any defense of Wilhite in the suit. After the failure to perform by Agency and consequent judgment against Wilhite for $6.5 million, the promised benefits of legal defense and the $25,000.00 liability protection limit would have been of little consequence to Wilhite. The decision of the Eighth Circuit, reducing actual damages from $6.5 million with interest, to $25,000.00 is akin to an effort to put the toothpaste back in the tube.

After the default judgment was rendered against Wilhite, it was too late for him to ask for the benefit of his bargain. It was the actual detriment or loss sustained by Wilhite which Wilhite was entitled to recover as damages attributable to the breach. The uncontroverted evidence at trial established that Agency's performance of its contractual obligations would have avoided the judgment against Wilhite for $6.5 million entirely. The loss (adverse judgment) occasioned by lack of performance is in fact the only evidence of damage Wilhite sustained. Agency's representatives admitted the foreseeability of their failure to perform resulting in the substantial judgment against Wilhite (see Petitioner's Appendix at p. 67, testimony of in-house counsel, Yormick).

The cases in Missouri dealing with bad faith consistently hold that an insuror is obligated to pay all resultant damages when it fails or refuses to settle within policy or liability protection limits available.

CONCLUSION

There were no tort-based damages assessed by the jury. The jury assessed the actual damages sustained by Wilhite as the result of wrongs of Agency. All of the elements necessary to prove the breach of contract, the actual damages, the fiduciary relationship and "control" over the settlement process were part of the evidence presented before the jury by virtue of the testimonial admissions of Agency's own representatives. The opinion of the Eighth Circuit did not involve a legal determination. It was merely disguised as one.

Respectfully submitted,

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